(2)

Single Bench

HONRABLE HIGH COURT OF JUDICATURE AT BILASPUR.

S.B.

S.B.

Cri.Appeal No:- 98 /06.

Appellant:- Banshi Mandave. Aged-27. yrs. S/o. Shanker Mandave occupation – Labour R/o. Kosanala P.S.- Supela -Durg. Distt- Durg.C.G.

(In jail)

667/06

07/2/06

Sabita Tiwari

07/2/06

R to D.R.(J)

by Shri .....

VERSUS.

Respondant :- State of C.G.

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7.3.06

CLERK to A. G. BILASPUR

CRIMINAL APPEAL

UNDER SECTION - 36 OF NARCOTIC DRUGS AND PSCYCHOTROPIC SUBSTANCE ACT - 1985.

A.F.R.

20

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.98/2006

Single Bench- Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Banshi Mandave

Vs.

State of Chhattisgarh

Present:-
Shri Abhay Tiwari, learned counsel for the appellant.
Shri U.K.S. Chandel, learned Panel Lawyer for the State.

ORAL JUDGMENT
(Delivered on 21st of March, 2006)

This appeal is directed against the judgment dated 28-09-2005 delivered by Shri A.R. Dhruv, Special Judge, Distt. Durg in Special Case No.26/2004 whereby the appellant was convicted under Section 20 (b) (ii) (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act, 1985) and was sentenced to rigorous imprisonment for 1 year and fine of Rs.1,000/- and in default of payment of fine to further additional rigorous imprisonment for 6 months.

2. Briefly stated the prosecution story is that Sub Inspector Anita Sagar PW-8 posted at P.S. Supela, upon receiving secret information about the transportation of illicit liquor by the appellant, went along with the police staff and witnesses Tiharu Yadav P.W. 1 and Bahadur Ram P.W. 6 and apprehended the appellant near his house in village

Kosana. Thereafter, Sub Inspector Anita Sagar P.W. 8 searched the house of the appellant at 6.40 p.m. without obtaining a search warrant and also without recording the information received by her as required under Section 42 of the Act. Inside the house of the appellant, 1 kg and 500 gms of *Ganja* was found wrapped up in a printed green saree and was seized vide Ex. P-2. The *Ganja* was weighed by Makhan Nishad P.W. 2 and found to be 1 kg 500 gms. Out of the substance so recovered, 2 samples of 50 gms each were taken and marked as 'A' and 'B'. The 2 samples marked 'A' and 'B' along with the remaining *Ganja* i.e. 1 kg 400 gms wrapped up in a green saree was entrusted for safe custody to Head Constable Bheekamchand P.W. 7, P.S. Supela, Distt. Durg. On 2.9.2004, the 2 sample packets were sent for chemical analysis to the Forensic Science Laboratory. Vide report Ex.P-20, both the packets were found to contain *Ganja*. After completion of investigation, the appellant was prosecuted under Section 20 (b) (ii) (B) of the Act. The appellant abjured the guilt, pleaded innocence and false implication and led no evidence in defence. The prosecution examined as many as 8 witnesses. Relying upon the testimony of Sub Inspector Anita Sagar P.W. 8 and the report of the Forensic Science Laboratory, the learned trial Judge convicted and sentenced the appellant as aforesaid in para 1.

3. Shri Abhay Tiwari, learned counsel for the appellant has assailed the conviction and sentence imposed on the appellant on the ground that independent witnesses of seizure Tiharu Yadav P.W. 1 and Bahadur Ram P.W. 6 did not support the prosecution story. There was absolutely no

evidence on record to show that the substance seized from the appellant or the samples taken therefrom were sealed on the spot. It was urged that there was also no evidence to show that the aforesaid articles were received in the Malkhana of P.S. Supela after the Station House Officer had affixed his seal thereupon, as required under Section 55 of the Act. It was also contended that Makhan Nishad P.W. 2 witness of weighment has also not supported the prosecution story. Lastly, it was contended that before effecting a seizure at 6.40 p.m. i.e. after sun set, Sub Inspector Anita Sagar P.W. 8 did not secure a warrant of search before effecting the search and also did not record the substance of the information received by her relating to possession of the Narcotic Drug by the appellant at his house. Thereby a serious non-compliance of Section 42 of the Act had taken place. On these grounds, Shri Abhay Tiwari, learned counsel for the appellant prayed that the conviction and sentence awarded by the learned trial Judge be set aside. On the other hand, Shri U.K.S. Chandel, learned counsel for the State has argued in support of the impugned judgment.

4. Having heard the rival contentions, I have gone through the record. Tiharu Yadav P.W. 1 and Bahadur Ram P.W. 6, both witnesses of seizure of *Ganja* from the appellant have not supported the prosecution story. A perusal of Ex.P-2 seizure memo clearly shows that the *Ganja* was recovered from the house of the appellant at 6.40 p.m. meaning thereby that the recovery was made after sun set. There is absolutely nothing in the testimony of Sub Inspector Anita Sagar P.W. 8 to show that before effecting seizure she

had obtained a search warrant or had recorded the substance of the information relating to possession of *Ganja* by the appellant in his house. Thus, serious non-compliance of the mandatory provisions of Section 42 of the Act vitiates the prosecution.

5. The testimony of Sub Inspector Anita Sagar P.W. 8 does not show that at the time of seizure, she had sealed the 2 sample packets or the remaining substance alleged to have been seized from the appellant. The testimony of Constable Dinesh Singh P.W. 4, Makhan Nishad P.W. 2 is also wholly silent on this point. Head Constable Bheekham Singh P.W. 7 who was the incharge of Malkhana at P.S. Supela also did not state that he had received the articles in a sealed condition. A perusal of the copy of the Malkhana Register Ex.P-16 clearly goes to show that the 2 sample packets marked 'A' and 'B' and the remaining *Ganja* was entrusted for safe custody at the Malkhana in an unsealed condition meaning thereby that the Station House Officer had also not affixed his seal on the articles so entrusted at the Malkhana. Thus, there was a serious non-compliance of Section 55 of the Act. The possibility that the substance sent for chemical analysis to the Forensic Science Laboratory could have been tampered with, cannot be ruled out.

6. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that in view of the serious non-compliance of Section 42 and Section 55 of the Act, conviction of the appellant under Section 20 (b) (ii) (B) of the Act and the sentence awarded thereunder by the trial Court deserves to be set aside.

7. In the result, the appeal is allowed. The conviction of the appellant under Section- 20 (b) (ii) (B) of the Act is set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Sd/-
DILIP RAOSAHEB DESHMUKH
Judge

Priya